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Supreme Court, U.S.
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No. 99-28

IN THE

Supreme Court of the United States

PHYSICIANS INSURANCE COMPANY OF WISCONSIN; PAUL K.H. FIGGE, JR., M.D.; WISCONSIN PATIENTS COMPENSATION FUND,

Petitioners,

v.

KIMBERLY SCHREIBER, a minor by her guardian ad litem, JOHN KRUEGER; GERALD SCHREIBER and JANICE SCHREIBER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONER WISCONSIN PATIENTS COMPENSATION FUND

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In this appeal, the Court is being asked to decide whether or not a doctor, just like his or her patient, is entitled to a right of self-determination protected by the Fourteenth Amendment to the Constitution. If the decision of the Wisconsin Supreme Court is not reversed, Wisconsin physicians will be forced to provide treatment on demand for their patients, even in circumstances where the doctor, under his medical judgment, does not believe that the treatment demanded is required, necessary, or proper. The decision forces doctors to physically provide treatment that they do not want to provide. It places doctors in a Catch 22 situation, having to chose between committing medical malpractice or violating the informed consent law created by the Wisconsin Supreme Court decision in this case. Review by the Supreme Court is necessary to protect the constitutional rights of Wisconsin doctors.

ARGUMENT

The right of self-determination has long-standing importance in this country's Anglo-American tradition. *In re Gardner*, 534 A. 2d 947, 950 (Me. 1987). "The right of self-determination and individual autonomy has its roots deep in our history." *Cruzan v. Harmon*, 760 S.W.2d 408, 416 n.11 (Mo. 1988). The right to self-determination is a liberty interest protected by the Fourteenth Amendment to the United States Constitution. *Hurtado v. People of California*, 110 U.S. 516, 536 (1884). *See also Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 269 (1990).

I. DOCTORS, LIKE THEIR PATIENTS, ARE ENTITLED TO EXERCISE THEIR RIGHT OF SELF-DETERMINATION.

The respondents do not deny that there is a constitutionally protected right to self-determination. Instead, they argue that only the patient, and not his or her doctor, possesses such a right. This interpretation of Fourteenth Amendment cannot be correct. A doctor should not be physically forced to perform procedures or treatments against his or her will.

The purpose of the informed consent law is to make sure a patient understands all of the risks and benefits associated with a particular treatment before agreeing to proceed with it. In this case, it is undisputed that Janice Schreiber gave her informed consent for the VBAC before she went into labor, and the treatment began. After the treatment started, Dr. Figge was under an obligation to proceed with the chosen course, unless something in Mrs. Schreiber's medical condition changed. Here, nothing changed. There were no medical symptoms that would have supported Dr. Figge performing a cesarean. It is not surprising that the plaintiffs dismissed their medical malpractice claim against Dr. Figge before trial began. *See* Pet. App. D at 50a. Dr. Figge's decision to proceed with the VBAC, because there was no medical condition to support performing a cesarean, was within the standard of care.

A. Dr. Figge Did Not Prefer Proceeding with the VBAC Instead of Performing a Cesarean.

Throughout their brief, the respondents state that Dr. Figge simply "preferred" the VBAC delivery over the cesarean, which is why Dr. Figge did not perform the cesarean when Mrs. Schreiber requested the procedure.

("Dr. Figge ignored her requests because . . . he *preferred* proceeding with the VBAC." *See* respondents' brief at 2 (emphasis added). *See also id* at. 9 and 15.) Respondents argue that Dr. Figge had done hundreds of cesareans before but, they imply, on the day of Mrs. Schreiber's delivery he just did not feel like performing a cesarean. That is an unfair depiction of what occurred.

To say that Dr. Figge proceeded with the VBAC because he "preferred" that treatment over the cesarean, implies that Dr. Figge did not care about his patient and that he did not evaluate his patient's medical condition at that point in time. The fact of the matter is that Janice Schreiber, and not Dr. Figge, chose the VBAC. Before her labor began, Mrs. Schreiber made the informed decision to proceed with the VBAC. At that time, she knew that she had already had two cesareans before, yet she still wanted to proceed with the VBAC. Before she chose the VBAC option, Mrs. Schreiber also knew all of the risks associated with that option. Moreover, Mrs. Schreiber, when deciding to proceed with the VBAC, knew that she could experience a long and difficult labor, since she had experienced 36 hours of unproductive labor during a prior delivery. Pet. App. D at 3a . Despite knowing all of this first hand, Mrs. Schreiber made the informed decision to proceed with the VBAC delivery. Dr. Figge proceeded with the chosen course and evaluated Mrs. Schreiber in accordance with the choice made. Nothing about her medical condition changed, which would have required a second discussion about the viable options. Mrs. Schreiber already knew the risks related to the labor process, including a lengthly, painful labor. Moreover, there were no medical symptoms that would support a decision to perform a cesarean.

Clearly, it probably would have been Dr. Figge's preference to perform a cesarean. It would have been faster, and Dr. Figge probably would have made more money from the procedure. However, Dr. Figge's preference has no relevance here. It also had no relevance in Dr. Figge's treatment of Janice Schreiber. Dr. Figge was providing treatment based upon the standard of care for a VBAC delivery. Dr. Figge had a duty to evaluate his patient at the point in time of the treatment and to deliver the treatment chosen by the patient. Once treatment began, which means once Mrs. Schreiber went into labor, Dr. Figge had to proceed in accordance with his medical judgment.

As one expert testified at trial, women ask for cesareans "with great regularity" during labor. (R. 100 at 45, 173-74). They also ask for sterilization. These demands are associated with the pain of labor and not the medical judgment of whether a cesarean, or sterilization, are proper at that point.

Respondents suggest that all Dr. Figge had to do was stop and give Mrs. Schreiber her options again, when she requested the cesarean. That cannot be the law. If it is the law, then all doctors who deliver babies will have to perform a cesarean each and every time a patient demands it during the labor and delivery process, even if there is no basis for it. (At the same time, the doctors will be subjected to a potential medical malpractice action should there be a complication during the cesarean).

B. Wisconsin Doctors are At Risk of Violating Either the Informed Consent Law or Committing Malpractice.

Respondents argue that a doctor is not at risk of violating either the informed consent law or committing malpractice, when the doctor is forced to perform the patient demanded

procedure. Respondents contend that "[i]f the physician provides the treatment with reasonable care, then he/she cannot be subject to liability merely for providing the treatment." *See* respondents' brief at 16. The respondents are wrong, and their position overly simplifies the problem. The reality is that if a doctor performs a procedure that is not medically indicated given the patient's medical condition, and something goes wrong during the procedure, even if it is a known complication, the doctor will be exposed to a malpractice lawsuit. The doctor will be criticized for performing the procedure when it was not medically appropriate under the circumstances presented at the time.

The respondents suggest that the fact that Dr. Figge had performed cesareans "hundreds of times before" Mrs. Schreiber's delivery is somehow relevant. Dr. Figge's experience with performing cesareans has nothing to do with whether Mrs. Schreiber's medical condition required the procedure. *See* Respondents' brief at 8.

Respondents also argue that if Dr. Figge did not want to do the cesarean he should have brought in another doctor to perform the procedure. That also cannot be the law. (Even assuming that another doctor could be found who would perform a cesarean based solely on the patient's demand). Dr. Figge, as the doctor performing the procedure selected by Mrs. Schreiber, evaluated Mrs. Schreiber and made the medical decision that there was no basis for performing a cesarean. No one criticized Dr. Figge for that medical decision. Instead, he was criticized for not explaining the options again to Mrs. Schreiber and then performing the procedure demanded by Mrs. Schreiber, against his medical judgment. The law in Wisconsin now requires a doctor to search for and find another doctor to perform a treatment that the original doctor does not deem appropriate, while the original doctor is in the midst of providing the treatment selected by his or her patient. For example, if a patient

selects that he receive stitches in his finger, instead of amputation, but then screams out during the stitching that he wants his finger cut off, does the doctor have to find a doctor to amputate?

II. THE WISCONSIN SUPREME COURT DECISION VIOLATES THE RIGHTS OF WISCONSIN DOCTORS.

To comply with the decision issued by the Wisconsin Supreme Court in this case, doctors must yield to the patient's demand during treatment. Doctors will be forced to physically provide treatment that they deem unnecessary, improper or not required. The decision violates Dr. Figge's right to self-determination and it will, in the future, violate the rights of other doctors.

A. The Cautionary Note Does Not Protect Wisconsin Doctors.

Respondents also argue that this case will not require treatment on demand, since the Wisconsin Supreme Court included a comment in its decision saying that "the opinion should not be interpreted as creating a patient's right to demand any treatment she desires." *See* Pet. App. A at 8a. Despite the cautionary note, the reality is that treatment on demand is precisely the result of the decision. There can be no other interpretation. Mrs. Schreiber's medical condition did not require a cesarean, but Dr. Figge has been found liable in this case because he did not heed his patient's demand. (If a woman in labor yells out that she wants to be sterilized, the doctor better perform the treatment, even if the patient before labor decided against sterilization, and even though the doctor believes that such a treatment is not medically warranted and the patient's demand is probably related to the labor itself).

Given the Wisconsin Supreme Court decision here, doctors will have to perform the cesarean or face being sued for a violation of Wisconsin's informed consent law. At the same time, Wisconsin doctors can expect to be criticized by the patient's health insurance company for performing an unwarranted treatment. Should anything go wrong during the demanded cesarean, the doctor should also be ready for a medical malpractice lawsuit, because the doctor performed a procedure without any basis for it.

It is the respondents' position that the Wisconsin Supreme Court "held Dr. Figge liable because he failed to conduct an informed consent discussion with Mrs. Schreiber after she withdrew her consent to the VBAC procedure and he thus deprived her of the opportunity to choose a viable treatment option." Respondents' brief at 6. They claim that Dr. Figge was not held liable because he failed to perform the cesarean at Mrs. Schreiber's request. *Id.* In fact, however, there is no difference between the two descriptions, in a case where the treatment has already begun, and the doctor is providing treatment based upon the course selected by the patient. If a patient demands a treatment other than the treatment previously selected and the treatment that is being provided, the effect is that the doctor must switch to the new treatment demanded, regardless of the consequences and regardless of whether the doctor believes that the treatment demanded at that point is proper. The Wisconsin Supreme Court decision requires the doctor to physically perform the treatment demanded, and it eliminates the doctors' right to self-determination.

B. Section 448.30 Does Not Require Two Discussions.

Respondents also argue that Dr. Figge should have told Mrs. Schreiber, at the point that she demanded the cesarean, the risks and benefits of the options. The respondents fail to mention that the discussion would have been no different than the discussion that Dr. Figge had with Mrs. Schreiber before Mrs. Schreiber went into labor and before Mrs. Schreiber made the informed decision to proceed with the VBAC.

The Wisconsin Supreme Court decision makes practicing medicine in Wisconsin like walking through a mine field. Doctors no longer have a right to self-determination. They must physically perform procedures demanded by their patients, despite the serious consequences.

Respondents argue this case involves only the application of sec. 448.30, Wis. Stats. *See* respondents' brief at 10. This case is not that simple. In this case, Dr. Figge followed sec. 448.30 and provided Mrs. Schreiber with all of the information necessary to give an informed consent, before the treatment began. She made a choice with regards to the viable options. Once treatment began, Dr. Figge was under an obligation to treat Mrs. Schreiber as he would treat any other patient proceeding with a VBAC. Section 448.30 does not require a doctor to have a second informed consent discussion with his/her patient during the treatment selected by the patient. Nothing changed about Mrs. Schreiber's condition that required a second discussion, except that she was demanding a specific treatment for which there was no medical indication. The petitioners are not asking that doctors be given a constitutional right to violate sec. 448.30, as respondents suggest. *See* respondents' brief at 11. Instead, the petitioners are asking that Wisconsin doctors be given the right to exercise their right of self-determination.

Doctors should not be forced to physically perform a treatment or procedure that the doctor does not believe is medically proper at that time.

In this case, Dr. Figge complied with sec. 448.30, Wis. Stats., yet he was still found liable under the doctrine of informed consent. The only reason he was found liable was because he did not provide the form of treatment demanded by the patient, in the middle of the treatment the patient had selected. Section 448.30 does not require that a doctor, in the middle of the treatment selected by the patient, to have a second discussion with the patient, when nothing has changed from the first discussion.

The Wisconsin Supreme Court decision will have far reaching effect in the practice of medicine in the future in Wisconsin. The opinion strips Wisconsin doctors of their right of self-determination in the practice of medicine and places doctors at the mercy of their patients' demands during the treatment process.

CONCLUSION

The petitioners respectfully request that this Court grant their Petition for Writ of Certiorari. The Wisconsin Supreme Court opinion in this case violates Dr. Figge's right to self-determination, which is protected by the Fourteenth Amendment to the United States Constitution. It eliminates a Wisconsin doctor's right to his or her own bodily integrity, because it forces a doctor to perform treatment on demand, against his or her own medical judgment.

Respectfully submitted,

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